MILIK PERUSAHAAN SDN BHD & ANOR

v.

KEMBANG MASYUR SDN BHD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: W-02-876-2001]
8 NOVEMBER 2002

TORT: *Damages - Assessment - Diminution in value principle - Reinstatement principle - Whether assessor must consider applicability of 'diminution in value principle' before applying 'reinstatement principle' - Rule in Rylands v. Fletcher - Escape of earth to adjoining land - Intention of tortfeasor to cause harm to plaintiff's land - Whether a relevant consideration*

TORT: *Rule in Rylands v. Fletcher - Escape of earth to adjoining land - Damages - Assessment - Diminution in value principle - Reinstatement principle - Whether assessor must consider applicability of 'diminution in value principle' before applying 'reinstatement principle' - Intention of tortfeasor to cause harm to plaintiff's land - Whether a relevant consideration*

CIVIL PROCEDURE: *Damages - Assessment of damages - Diminution in value principle - Reinstatement principle - Whether assessor must consider applicability of 'diminution in value principle' before applying 'reinstatement principle' - Tort - Rule in Rylands v. Fletcher - Escape of earth to adjoining land*

CIVIL PROCEDURE: *Appeal - Appeal from registrar to judge-in-chambers - Admissibility of fresh evidence - Principles applicable - Ladd v. Marshall - Rules of the High Court 1980, O. 56 r. 3A - Comparison with appeals from High Court to Court of Appeal*

CIVIL PROCEDURE: *Appeal - Fact, findings of - Interference by appellate court - Whether appeal emanated from judge-in-chambers alone - Whether essentially an appeal against concurrent findings of fact made by both the registrar and the judge-in-chambers - Whether Court of Appeal will interfere with concurrent findings of fact or concurrent exercise of discretion - Serious error of principle*

The plaintiff brought an action against the defendant, founded upon the rule in *Rylands v. Fletcher*, seeking a mandatory injunction and damages. The trial judge found for the plaintiff and directed the registrar to assess damages. Being dissatisfied with the registrar's assessment, the defendant appealed to the judge-

in-chambers who then heard and dismissed the appeal. The instant appeal to the Court of Appeal was from the said decision of the judge-in-chambers upholding the assessment made by the registrar. The pith of the defendant's argument was that the registrar had erred in applying the 'reinstatement principle' without first considering the applicability of the 'diminution in value principle'.

Held:

Per Gopal Sri Ram JCA

[1] There is **no** a priori rule that a registrar assessing damages ought to have resort first to the 'diminution in value principle' and exclude its application on the evidence before having resort to the 'reinstatement principle'. (p 19 d)

[2] One of the relevant considerations which an assessing court may take into account is the intention of the tortfeasor, for example, as in the instant case, the intention to cause harm to the plaintiff's land. (pp 20 g & 21 e-f)

[3] The registrar was entirely correct in her approach to the assessment. Any reasonable tribunal, properly directing itself on the evidence available, would have made the same assessment. The figure awarded by the registrar was wholly reasonable having regard to the facts and circumstances of the case. The judge-in-chambers who heard and dismissed the defendant's appeal was also entirely correct in treating the matter **not** as coming before him for the first time but as an appeal against findings of fact. (pp 20 h-i & 21 a-b, d)

Per curiam

[1] In consequence of O. 56 r. 1(3A) Rules of the High Court 1980 ('RHC'), the principles governing an appeal from a registrar to a judge-in-chambers are now **no** different from those governing an appeal from a trial on the merits in the High Court to the Court of Appeal. On such an appeal to the Court of Appeal, fresh evidence is not admissible unless the conditions set out in *Ladd v. Marshall* are met. Order 56 r. 1(3A) RHC is a statutory codification of the principles laid down in *Ladd v. Marshall*. (p 18 h)

[2] The instant appeal should not be treated as one emanating from the judge-in-chambers alone. It was, essentially, an appeal by the defendant against concurrent findings of fact made by both the registrar and the judge-in-chambers. Save only in the most exceptional of circumstances, where a serious error of principle has occurred, the Court of Appeal will **not** interfere with such concurrent findings of fact or concurrent exercise of discretion. (p 19 a-c)

[Defendant's appeal dismissed.]

a *[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif memulakan satu tindakan terhadap defendan, yang diasaskan pada kaedah di dalam *Rylands v. Fletcher*, yang memohon injunksi mandatori dan gantirugi. Hakim perbicaraan memberi keputusan yang memihak kepada plaintif dan mengarahkan pendaftar untuk menilai gantirugi. Oleh kerana tidak *b* berpuashati dengan taksiran pendaftar, defendan merayu kepada hakim dalam kamar yang telah kemudiannya mendengar serta menolak rayuan tersebut. Rayuan semasa kepada Mahkamah Rayuan adalah daripada keputusan hakim dalam kamar tersebut yang mempertahankan taksiran yang dibuat oleh pendaftar. Intipati hujahan defendan adalah bahawa pendaftar telah tersalah *c* pertimbangan dalam memakai 'reinstatement principle' tanpa mempertimbangkan terdahulu keadaan boleh dipakai akan 'diminution in value principle'.

Diputuskan:
Oleh Gopal Sri Ram HMR

d **[1]** Tidak terdapat kaedah a priori bahawa seseorang pendaftar yang menaksirkan gantirugi haruslah pertamanya berpaling kepada 'diminution in value principle' dan mengecualikan pemakaiannya ke atas keterangan tersebut sebelum berpaling kepada 'reinstatement principle'.

e **[2]** Salah satu dari pertimbangan-pertimbangan relevan yang sesebuah mahkamah yang membuat taksiran boleh mengambilkira adalah niat pelaku tort tersebut, contohnya, sepertimana dalam kes semasa, niat untuk menyebabkan kemudaratan kepada tanah plaintif.

[3] Pendaftar tersebut adalah sesungguhnya betul di dalam pendekatan beliau *f* kepada taksiran tersebut. Sebarang tribunal wajar, yang mengarahkan dirinya dengan sempurna atas keterangan yang ada, tentu akan membuat taksiran yang sama. Angka yang diberikan oleh pendaftar adalah sesungguhnya wajar memandangkan fakta-fakta dan keadaan-keadaan kes tersebut. Hakim dalam kamar yang mendengar dan menolak rayuan *g* defendan adalah juga sesungguhnya betul dalam melayan perkara tersebut bukan sebagai perkara yang tiba di hadapannya buat pertama kali tetapi sebagai satu rayuan terhadap keputusan fakta..

Per curiam:

h **[1]** Akibat dari A. 56 k. 1(3A) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT), prinsip-prinsip yang menguasai sesuatu rayuan daripada seorang pendaftar kepada seorang hakim dalam kamar adalah kini tiada bezanya daripada yang menguasai sesuatu rayuan daripada perbicaraan atas merit-

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merit di dalam Mahkamah Tinggi kepada Mahkamah Rayuan. Atas rayuan yang sedemikian kepada Mahkamah Rayuan, keterangan baru tidak boleh diterima masuk melainkan syarat-syarat yang dibentangkan di dalam *Ladd v. Marshall* dipenuhi. Aturan 56 k. 1(3A) KMT adalah suatu penyusunan statutori akan prinsip-prinsip yang dibentangkan di dalam *Ladd v. Marshall*.

[2] Rayuan semasa tidak seharusnya dilayan sebagai suatu rayuan yang datangnya daripada hakim dalam kamar tersebut sahaja. Ianya adalah, secara pentingnya, suatu rayuan oleh defendan terhadap keputusan fakta bersama yang dibuat oleh kedua-duanya pendaftar dan hakim dalam kamar. Melainkan hanya dalam keadaan-keadaan yang paling terkecuali, di mana satu kesilapan prinsip yang serius telah berlaku, Mahkamah Rayuan tidak akan merayu dengan keputusan bersama yang sedemikian atau perlaksanaan budibicara bersama yang sedemikian.

Rayuan defendan ditolak.]

Case(s) referred to:
DoCarmo v. Ford Excavation [1981] 1 NSWLR 409 ***(refd)***
Ladd v. Marshall [1954] 3 All ER 745 ***(refd)***
Lau Foo Sun v. Govt of Malaysia [1970] 2 MLJ 70 ***(refd)***
Munelly v. Calcon [1978] IR 387 ***(foll)***
Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 ***(refd)***

Legislation referred to:
Rules of the High Court, O. 38 r. 12, O. 56 r. 1(3A)

For the appellants - Dato' Dr Cyrus V Das (S Nantha Balan & HH Tay); M/s Tay & Helen Wong
For the respondent - K Ananthnam (TC Tan); M/s TC Tan & Co

Reported by Gan Peng Chiang

JUDGMENT
(Oral)

Gopal Sri Ram JCA delivering judgment of the court:
This is the judgment of the court.

This appeal arises from an order assessing damages in tort under what has come to be known as the rule in *Rylands v. Fletcher* [1968] LR 3HL 330. For convenience we will refer to the parties according to the title assigned to them in the court below. This is the defendant's appeal.

The plaintiff and defendant are neighbours. The defendant's land is on an elevated plane. The plaintiff's adjoining land is on a much lower level. The defendant conducted some activities on its land. Earthworks were involved. There was a mudslide. Earth from the defendant's land was deposited onto the plaintiff's land. From the evidence it appears quite clearly that the soil deposits were considerable. The plaintiff launched an action in which it sought, *inter alia*, a mandatory injunction and damages. The trial judge found for the plaintiff. She held the defendant liable under the rule in *Rylands v. Fletcher*. But she denied the injunction. She then directed assessment of damages be conducted by the registrar. In the proceedings before the registrar some evidence was called. The evidence recorded by the learned trial judge was also read into the proceedings before the registrar. This is entirely in accordance with our procedural requirements.

Order 38 r. 12 of the Rules of the High Court permits such a course to be taken. That rule of court reads as follows:

> Any evidence taken at the trial of any cause or matter may be used in any subsequent proceedings in that cause or matter.

At the conclusion of the trial, the learned registrar entered judgment for a sum of RM7,462,377.93. She did not merely issue a certificate. She gave reasons. The defendant was unhappy. It appealed to the learned judge in chambers in the usual way. The learned judge dismissed the appeal. He agreed with the registrar. He found no error in the methodology she had applied. The defendant now comes before us and complains that the registrar was wrong.

Dato' Dr Cyrus Das with his usual clarity of argument put his client's case in a very narrow compass. His argument is that the learned registrar had erred in applying the reinstatement principle without first considering whether the diminution in value principle ought to be applied. It is counsel's submission that as a general rule, in an assessment of damages in a case of this sort by a master or registrar, resort should be first had to the diminution in value principle. It is only upon a finding that that principle is not applicable, is the assessing registrar entitled to have resort to the reinstatement method. Counsel cited a number of authorities and he must forgive us if we do not refer to any of them here because we find that the principles are well established and do not warrant any further discussion.

In responding to the appeal, Mr Anantham who appears for the plaintiff argued that there is no fixed approach of the kind suggested by Dato' Dr Cyrus Das. According to Mr Anantham it all depends on the facts and circumstances of each case.

Before we make our comment on the merits of the submissions advanced before us we consider it necessary to remind ourselves of the nature of the appeal with which we are concerned. This is not a run of the mill appeal from a registrar to a judge and then to this court, for example on a summons for judgment or other interlocutory proceedings. In those types of cases, prior to the amendment to O. 56 of the Rules of the High Court, the approach of our courts has always been not to treat the proceedings before the judge as a mere continuation of the proceedings before the registrar. The position is summed up in the following judgment of that very eminent and learned judge Edgar Joseph Jr, SCJ in *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716 at p. 724:

> With Lord Atkin's observations in mind, the first point we should like to make is that since the registrar gave no judgment but only a bare decision, or in other words, a simple *ipse dixit*, it deserved no weight at all. Yet, it is obvious that the judge gave some weight to the decision of the registrar.
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> The second point we should like to make is that the judge did mention in passing – in our view quite correctly – that though the matter before him was in form an appeal, it did 'take the shape and style of rehearing ...'. However, in his approach to the questions for decision, he treated the appeal, in the fullest sense, as an appeal from a discretionary order made by the registrar.
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> In other words, it looks very much as though the judge's approach was that he should not interfere with the registrar's exercise of discretion unless it was shown that the discretion had been exercised on a wrong principle or not at all, or that there had been a miscarriage of justice. In other words, as an appellate judge, he was not to exercise an independent discretion of his own, but had to defer to the registrar's exercise of his discretion and could not interfere with it merely on the ground that he would have exercised it differently. (See *37 Halsbury's Laws of England* (4th edn) para 656 at p 493.) In adopting this approach, the judge was wrong, the appeal before him being from the registrar by way of an actual rehearing.
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> Accordingly, in the event of a further appeal from the judge to the Supreme Court, the substantial discretion is that of the judge and it is the judge's order which becomes most material. We are supported in this by the following passage in the judgment of Lord Wright in *Evans v. Bartlam* at p. 484:
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> > The Master had, in the exercise of his discretion under O. XXVII r. 15, or O. XIII r. 10, refused to set aside the judgement. But it is clear that where the Court of Appeal is required to review a discretionary order of a judge reversing the Master the substantial discretion is that of the judge, and it is the judge's order which must particularly be considered by the appellate court: *Cooper v. Cooper* [1936] WN 205. The Masters admirably exercise their discretion in routine matters of pleading, discovery, interrogatories, venue, mode of trial, and other

> interlocutory directions, without any appeal being necessary. But such matters may on occasion raise questions most vital to the final issue of the case. The decision of such questions is properly for the judge who will no doubt consider carefully the order of the Master. If a further appeal is taken to the Court of Appeal it is the judge's discretion which that court has either to support or vary or reverse.

> With respect, counsel for the sub-contractor was, therefore, equally wrong in contending before us, as he did in fact contend, that the present appeal was an appeal against concurrent findings of fact, with all the disadvantages this entails for those who seek to challenge such findings.

To sum up, the position as it obtained when his lordship delivered his foregoing view was that a judge on an appeal to him in chambers from a registrar treated the summons as if it had never been previously heard. The matter was taken as if it was coming before him for the very first time. Now this approach had certain important procedural consequences. It meant that either side could put in fresh evidence which was not available before the registrar. So, if for example, a plaintiff failed to obtain judgment on his summons before the registrar he could file fresh evidence in his appeal to the judge in chambers and argue that based on the totality of the evidence now before the judge, he was entitled to succeed. Likewise in the case of an unsuccessful defendant.

But all that has changed. We now have a very important amendment to O. 56. It was introduced in 1993. It is r. 1(3A) of O. 56. It reads as follows:

> At the hearing of the appeal fresh evidence shall not be admitted unless the Judge is satisfied that:
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> (a) at the hearing before the Registrar the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and
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> (b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the Registrar.

The rule is a statutory codification of the principles laid down by the English Court of Appeal in *Ladd v. Marshall* [1954] 3 All ER 745. As a result of r. 1(3A), the principles governing an appeal from a registrar to a judge in chambers are now no different from those governing an appeal from a trial on merits from the High Court to this court. On such an appeal to this court fresh evidence is not admissible unless the conditions set out in *Ladd v. Marshall* are met: *Lau Foo Sun v. Govt of Malaysia* [1970] 2 MLJ 70.

How then should we approach the present appeal? In our judgment, we ought not any longer to treat a case as the present instance as one emanating from the judge alone. It is our judgment that this is essentially an appeal against concurrent findings of fact. The registrar made her findings on the evidence before her and came to certain conclusions. The learned judge has agreed with those conclusions. The defendant therefore begins with a singular disadvantage before us. For, it is a general principle upon which this court acts that save in most exceptional circumstances, concurrent findings of fact will not be gone into by us. But that is not to say that an appeal of this nature will never succeed. If an appellant can sufficiently demonstrate to a conviction that a serious error of principle has occurred at both the lower tiers of the High Court, this court will have no hesitation; and indeed we are duty bound; to correct the resultant error.

That brings us to the central question, namely whether there has been any error of principle in this case. Here we would agree with the submission of Mr Anantham that there is no *a priori* rule that the registrar assessing damages ought to have resort first to the diminution in value principle and exclude its application on the evidence before having resort to the reinstatement method. Counsel's submission is borne out by the authorities. Once again we must be forgiven if we do not refer to the copious citation of cases during argument.

The sole authority we need to refer to is a case cited to us by both sides. It is the judgment of the Irish Supreme Court in *Munelly v. Calcon* [1978] IR 387. In that case Henchey J said:

> Since this case was decided in the High Court, the question of the correct measure of damages in circumstances such as those now before us was considered by May J in *C.R. Taylor Ltd. v. Hepworths Ltd.* Among the passages cited with approval in the judgment in that case is the following from McGregor on Damages (13th edn, 1972) at paragraph 1061:
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> > The difficulty in deciding between diminution in value and cost of reinstatement arises from the fact that the plaintiff may want his property in the same state as before the commission of the tort but the amount required to effect this may be substantially greater than the amount by which the value of the property has been diminished. The test which appears to be the appropriate one is the reasonableness of the plaintiff's desire to reinstate the property; this will be judged in part by the advantages to him of reinstatement in relation to the extra cost to the defendant in having to pay damages for reinstatement rather than damages calculated by the diminution in the value of the land.
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> Accepting that passage as correctly reflecting the state of the law, at p. 667 of the report May J said:

> The various decided cases on each side of the line to which my attention has been drawn, and to some of which I have referred in this judgment, show in my opinion merely the application in them of two basic principles of law to the facts of those various cases. These two basic principles are, first, that whenever damages are to be awarded against a tortfeasor or against a man who has broken a contract, then those damages shall be such as will, so far as money can, put the plaintiff in the same position as he would have been had the tort or beach of contract not occurred. But secondly, the damages to be awarded are to be reasonable, reasonable that is as between the plaintiff on the one hand and the defendant on the other.
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> I accept those two principles as being basis to, although not necessarily exhaustive of, the concept of restitutio in integrum on which the law of damages rests in cases such as this. It is in the application of those principles that difficulty may arise, for a court, in endeavouring to award a sum which will be both compensatory and reasonable, will be called on to give consideration, with emphasis varying from case to case, to matters such as the nature of property, the plaintiff's relation to it, the nature of the wrongful act causing the damage, the conduct of the parties subsequent to the wrongful act, and the pecuniary, economic or other relevant implications or consequences of reinstatement damages as compared with diminished value damages. The reported cases, therefore, required to be viewed primarily as exemplifications of the application to special facts of two principles to which I have referred.

Mr Anantham has argued that there are circumstances here which warranted the registrar to apply the reinstatement principle. He has drawn our attention quite correctly to the evidence recorded by the learned trial judge. The relevant passage is to be found at p. 205 of the second volume of the appeal record. It is the evidence of DW1. This is what he said:

> **Page 11 – photos 1 & 2:**
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> If it is in 1989, I agree that the earth drain was built to directly discharge water and sediment into Plaintiff's land.

Mr Anantham says that this is supportive of an intention to cause harm to the plaintiff's land. We agree. As observed by Henchey J with whose judgment we are in agreement in the passage quoted above, one of the relevant considerations which an assessing court may take into account is the intention of the tortfeasor.

Having carefully considered the rival arguments of counsel on both sides, we have come to the conclusion that the learned registrar was entirely correct in her approach to the assessment. Indeed we are of the view that any reasonable tribunal properly directing itself on the evidence before it in this case would have come to the same conclusion and made the same assessment as the registrar made in the present instance.

We are equally unable to detect any error in the approach adopted by the learned judge. He treated the matter as coming before him not for the first time, but as an appeal on findings of fact. He was entirely correct in doing so. That is the approach which commended itself to Cross J in *DoCarmo v. Ford Excavation* [1981] 1 NSWLR 409, where at p. 420 he said this:

> In my view a similar approach should and indeed must be adopted where the master's decision is brought on appeal to a single judge. It follows that in such an appeal, if no fresh evidence is called to warrant a departure from a master's primary findings of fact, those findings of fact are binding on the court hearing the appeal unless those findings, or the inferences drawn from them, are so flawed as to attract the approach taken in *Warren v. Coombes* [1979] 52 ALJR 293. In my view this is the manner in which I must approach the findings of fact by the learned Master in the present case.

We add, *ex abundanti cautela*, that the relevant rule of practice in New South Wales is in *para materia* with our amended O. 56 on the question of further evidence.

We have taken a step back and looked at the figure awarded by the registrar in the round. We find it entirely reasonable having regard to the facts and circumstances of this case.

In the circumstances we have adumbrated, we find that the defendant has been unable to cross the threshold set by the law on an appeal involving concurrent findings of fact or concurrent exercise of discretion. We have included the latter phrase "concurrent exercise of discretion" because at the end of the day, an award of damages by a court in a case as this is really an exercise of discretion. Save in very exceptional circumstances, it is not a mathematical certainty.

For the reasons already given, the appeal fails. Before we conclude and make the appropriate orders, we would be failing in our duty if we did not express our deep appreciation to counsel who have argued this case with erudition before us. But for the clarity of their submissions and the citation of directly applicable authorities, this *ex tempore* judgment would not have been possible. We would now invite our learned brother Alauddin bin Dato' Mohd. Sheriff, JCA to declare the orders the court now makes on this appeal.

Alauddin Mohd Sheriff JCA:
The appeal is dismissed with costs. The deposit is to be paid out to the respondent towards account of taxed costs. Order of the judge is upheld.

Arguments heard on 26 July 2002 and judgment delivered in Open Court on 28 August 2002.